No. 77-1671

IN THE

Supreme Court of the United States

October Term 1978

MODJESKA SIGN STUDIOS, INC.,
Appellant,

v.

PETER A. A. BERLE,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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The State in its motion to dismiss questions the finality of the judgment and asserts that the questions presented are not substantial. We reply below.

I. THE JUDGMENT BELOW IS FINAL WITHIN THE MEANING OF 28 U.S.C. § 1257.

The Court of Appeals held that the New York statute requiring the removal of appellant Modjeska's signs from Catskill Park did not abridge Modjeska's freedom of speech in violation of the First and Fourteenth Amendments and that the signs could be removed without the payment of the just compensation that the Fifth and Fourteenth Amendments require be paid when private property

is taken for public use. The court's judgment is plainly final on those two issues. However, the court remanded the case for trial of a separate issue, albeit an issue related to its holding that the signboards could be removed without recourse to the power of eminent domain and the payment of just compensation.

Thus, the judgment of the Court of Appeals is not a textbook "final judgment." But that fact does not prevent it from being a final judgment within the meaning of the statute, 28 U.S.C. § 1257(2), authorizing this Court to review on appeal certain "final judgments or decrees" of the highest court of a state in which a decision could be had. *Cox Broadcasting Co.* v. *Cohn*, 420 U.S. 469 (1975).

In the *Cox Broadcasting* case the Court listed four categories of cases in which it has treated a state court determination of a federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 even though "there are further proceedings in the lower state courts to come." *Id.* at 477. This case plainly fits in one or both of two of the listed categories.

The Court of Appeals' remand to the trial court was for the purpose of determining whether, according to standards that the court laid out, the six-and-one-half-year period between the enactment of the statute and the deadline for removal of Modjeska's signs was a reasonable period. (Jur. St. 7a-12a.) The court held that the billboards could be removed in the exercise of the police power, without monetary compensation, but that because the only state interest asserted was a rather attenuated, non-compelling interest in aesthetics, a reasonable grace period, or period of "amortization," must be allowed. (*Id.* at 7a-8a.) The court added that, "[w]hile an owner need not be given that period of time necessary to permit him to recoup his investment entirely . . . , the amortization period should

not be so short as to result in a substantial loss of his investment." (*Id.* at 10a-11a.)

Thus, this case fits within the second category of cases described in *Cox Broadcasting*, "cases such as *Radio Station WOW, [Inc.* v. *Johnson*, 326 U.S. 120 (1945),] and *Brady* v. *Maryland*, 373 U.S. 83 (1963), in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." 420 U.S. at 480. Certainly the First Amendment question will survive and require decision regardless of the outcome of the "reasonableness" trial. And the taking question will also survive — because by the highest state court's decision the "amortization" period is not and, to be reasonable, need not be the equivalent of just compensation.*

From a slightly different perspective, the case also fits within the fourth category in the *Cox Broadcasting* scheme. The fourth category consists of cases in which a federal issue has been finally decided, with further proceedings in which the appellant or petitioner might prevail on non-federal grounds but where reversal on the federal issue already decided would preclude the further litigation. In such cases "if a refusal immediately to review the state-

*Because the determination of the "reasonableness" of the grace period is not a determination of the justness of compensation but instead is made because it has been decided that just compensation need not be paid, this case is not the classical eminent domain case dealt with in footnote 6 of the *Cox Broadcasting* opinion (Motion 9). In such a case, to be sure, "a state judgment is not final unless it covers both aspects of that integral problem," the problem of taking and just compensation. Cox Broadcasting Co. v. Cohn, 420 U.S. 469, 477 n. 6 (1975), quoting North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 163 (1973). Here "both aspects" of the "integral" eminent domain problem have been determined. The state court has ruled that there is no taking and therefore just compensation need not be paid.

court decision might seriously erode federal policy, the Court has entertained and decided the federal issue . . . ." 420 U.S. at 482-83. Reversal on either the First Amendment issue or the taking issue in this case would clearly preclude any farther litigation as to the reasonableness of the grace period. And at least as to the free speech issue, deferral of review "might seriously erode federal policy" embodied in the First Amendment. It would do so by maintaining the atmosphere of uncertainty of the extent of constitutional protection of one of our important media of communication that has nurtured the New York statute in this case, other farther-reaching statutes and ordinances and the litigation represented by this case, its companion, *Suffolk Outdoor Advertising Co.* v. *Hulse*, No. 77-1670, and related cases elsewhere in the country. Cf. *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241 (1974), discussed in *Cox Broadcasting*, 420 U.S. at 484-85.

II. THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

On the First Amendment question, the State, like the Town of Southampton in the companion case, No. 77-1670, argues that *Markham Adv. Co.* v. *Washington*, 73 Wash. 2d 405, 439 P.2d 248 (1968), *appeal dismissed*, 393 U.S. 316 (1969), is controlling and that New York's statute, like the Southampton ordinance, is a valid "time, place or manner" restriction of commercial speech. We adopt here the brief in opposition in No. 77-1670, copies of which are being served on counsel for the appellee in this case.

There are some fillips to the State's argument that merit separate response.

First, the State attempts to impart to the statement of the courts below that other means of communication are available to persons who would advertise their wares and services in the commercial areas of Catskill Park the dignity

of factual findings. (Motion 15.) They are not findings entitled to any deference. The case was decided on motions without any facts being found. The facts as to the inadequacy or non-existence of other channels of communication are those mentioned in the jurisdictional statement (Jur. St. 11-12), which could have been proved under the allegations of Modjeska's complaint and which must be taken as established.

Second, the State attempts to distort this Court's apparent reservation in *Linmark Assocs., Inc.* v. *Township of Willingboro*, 431 U.S. 85, 93-94 & n.7 (1977), of the question of the constitutionality of a prohibition of all signs regardless of content into a suggestion by the Court that such a prohibition would be valid. (Motion 16.) The Court knows whether it meant to reserve a question or suggest an answer, but when the Court's last pronouncement on an issue is at most a mere suggestion, we submit that it cannot fairly be said that "the question is foreclosed by our decisions or that it is so clearly not debatable as to require dismissal for lack of substance." *Chesebro* v. *Los Angeles County Flood Control Dist.*, 306 U.S. 459, 463 (1939).

So far as the taking issue is concerned, it is true, as the State says (Motion 17-18), that in *Markham* the statute provided for a so-called amortization period, as does New York's statute, and so did ordinances involved in cases in which this Court has denied certiorari. None of those cases involved so sweeping and wholesale an eviction of billboards from an area as does the Catskill Park statute. In any event, those cases do not establish that an amortization period is "a constitutionally adequate and permissible alternative to compensation" (Motion 18) if there has been a taking. Just compensation is nothing less than "a full and perfect equivalent for the property taken," *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 326 (1893), or "the full monetary equivalent of the property taken," *United States* v. *Reynolds*, 397 U.S. 14, 16 (1970); *United*

States v. *General Motors Corp.*, 323 U.S. 373, 379 (1945). The question whether, when billboards are ordered removed from an entire geographical area, there has been a taking and compensation of that sort must be paid is a question that deserves the plenary consideration of this Court.

Respectfully submitted,

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